2010 WL 6488249 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Anna M. FELDSTEIN, Appellant,
v.
Linda BUCKEL, et al., Appellees.

No. 01860.
September Term, 2009.
October 1, 2010.

Appealed from the Circuit Court for Allegany County, Maryland (The Honorable Fred A. Wright, Judge)

Appellant's Brief

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The action is based on a claim that Feldstein was blocking a right of way created by the deed by which Feldstein conveyed to Linda Buckel a portion of her property. On November 20, 2007, a Complaint for Injunctive Relief, Declaratory Judgment and Monetary Damages was filed by Linda Buckel and Buckel and Levasseur (hereinafter collectively "Buckel" unless otherwise noted) against Anna Marie Feldstein (hereinafter "Feldstein") (E017-035). With the Complaint were a Motion for a Temporary Restraining Order and Motion for Preliminary Injunction. The Complaint contained four counts: Count I sought injunctive relief to prevent Feldstein from blocking an "alley" eight feet in width from Small wood Street in the City of Cumberland across Feldstein's property to the property of Linda Buckel; Count II alleged tortious interference with economic relations by Feldstein arising from her placing a plastic chain across the "alley" thereby allegedly damaging Buckel; Count III alleged that the actions of Feldstein constituted a nuisance damaging Buckel; and Count IV sought a Declaratory Judgment as to the rights and status of the parties as to the alleged easement across Feldstein's property. Counts II and III sought both compensatory and punitive damages. Buckel subsequently sought a jury trial on Counts II and III.

A hearing was held on Plaintiff's motions for preliminary injunctive relief on December 3, 2007; and following testimony being taken, the Court ruled on December 7, 2007, that Feldstein was precluded from erecting any type of barrier over the alleged right of way and that Buckel was required to file a bond in the amount of $1,500.00 ***5** (E036-037). This decision was appealed by Feldstein; however, she subsequently voluntarily dismissed the appeal.

Discovery commenced and continued throughout the course of the proceedings. Because Buckel was an attorney regularly engaged in practice in Allegany County, and Buckel and Levasseur was a law firm in Allegany County, Feldstein filed a Motion to Recuse. By Order of June 23, 2008, the Honorable Fred A. Wright was designated to preside over the proceedings.

On December 8, 2008, a Motion for Summary Judgment and Memorandum in support thereof was filed by Feldstein (E041-045). This Motion sought a judgment on the basis that the deed from Feldstein to Buckel was unambiguous; and, that the easement was at the property line at the rear of Feldstein's property and was eight feet in width. It also sought summary judgment on both compensatory and punitive damages. An Opposition to Defendant's Motion and Cross Motion for Partial Summary Judgment were filed by Buckel (E046-051). The Cross-Motion asserted, in effect, that the language of the deed was "clearly ambiguous" and therefore the parties intended the "gravel drive" to be the right of way. Defendant filed an Opposition to Plaintiff's Cross Motion (E052-054). On January 15, 2009, a hearing on the Motions was held. Following the hearing, the Court denied Feldstein's Motion, except on the issue of punitive damages as to which it reserved ruling, and denied Buckel's Motion for Partial Summary Judgment (E055-057). The matter was bifurcated for trial such that Counts I and IV would be heard first and the tort claims in Counts II and III would be heard later depending on the outcome of the trial on Counts I and IV.

***6** On January 20, 2009, trial was held. At the conclusion of the trial the Court found for Buckel holding that the easement was across the gravel drive. On February 20, 2009, the Court entered a written Judgment on Counts I and IV, and a separate Order granting Feldstein's Motion for Summary Judgment on the issue of punitive damages. Feldstein filed a Motion to Alter

or Amend the Judgment due to the fact that it relied on and referred to a document not in evidence. This Motion was granted and an Amended Judgment entered on May 21, 2009 (E168-169). On September 29, 2009, Buckel dismissed with prejudice Counts II and III (E170). The appeal to this Court was noted on October 21, 2009 (E171).

QUESTIONS PRESENTED

I. Did the Circuit Court err when it determined the deed from Feldstein to Buckel was ambiguous in relation to the location of the easement and its dimensions?

II. Did the Circuit Court err when it determined the location of the easement to be the "gravel driveway" on Feldstein's property?

III. Did the Circuit Court err when it determined that the easement would be greater than eight feet in width?

*7 *STATEMENT OF FACTS*

The dispute between Feldstein and Buckel involves the location and dimensions of an easement from the property of Buckel crossing the property of Feldstein to Smallwood Street in the City of Cumberland. In the deed from Feldstein to Buckel, the following language appears: "Also, the right and privilege to use jointly with the adjoining property owner, as a passageway or outlet, the alley eight feet in width leading to Smallwood Street from the rear of the aforesaid Lot 62..." (E122). It is this language which gives rise to the action.

The parcels now owned by Feldstein and Buckel comprise Lot 62 of the original Town Lots of the City of Cumberland. Lot 62 was separated into two parcels as a result of a deed dated March 22, 1889, from Horace Brooks et ux to Ferdinand Williams, and filed for record in Liber 66, folio 385, among the Land Records of Allegany County (E137-138). As part of that conveyance, the Brooks granted "...the right and privilege to use jointly with Horace Brooks aforesaid as a passageway or outlet the alley eight feet in width leading to Smallwood Street from the rear of said Lot 62...". The portion of Lot 62 retained by the Brooks (the "Brooks Parcel") was ultimately conveyed to James and Margaret **Elder** by deed dated January 22, 1941, and filed for record in Liber 189, folio 133, among the Land Records (E142-143). This deed contains the same language as was contained in the original Brooks to Williams' conveyance. The portion of Lot 62 conveyed to Williams (the "Williams Parcel") was ultimately conveyed to James **Elder** and Margaret **Elder** by deed dated August 23, 1963, and filed for record in Liber 364, folio 213, among the Land Records (E144-145). This deed contains the following ***8** language: "...the right and privilege to use jointly with the owners of the adjoining property as a passageway or outlet the alley eight feet in width leading to Smallwood Street from the rear of Lot 62." At this point both parcels became owned by James and Margaret **Elder**. Upon the death of James **Elder**, who had survived Margaret, the property was conveyed by the Personal Representative of James **Elder's** estate to John Robert Adams and Evelyn Adams. In that both parcels were then commonly owned, the deed, dated January 30, 1981, and filed in Liber 522, folio 662, makes no reference to the alley (E146-I48). Evelyn Adams conveyed the property to Feldstein and her husband by deed dated September 30, 1983, filed in Liber 537, folio 753. This deed likewise makes no reference to the alley (E149-150).

Feldstein's property fronts on Washington Street and runs along Smallwood Street for a distance of 170 feet. There are two curb cuts, the first is at the back of Feldstein's home, approximately 2/3 of the distance from Washington Street, and the second is at the rear of the property (E044; E159). During the period of their ownership Feldstein and her husband used both curb cuts, however, used the first of the curb cuts more frequently because it was closer to the home and more convenient for them (E044). In 2001, Feldstein and her husband conveyed the Williams Parcel to Linda Buckel. They retained the Brooks Parcel. The original deed which was drafted made no mention of any right of way or easement. At closing, Feldstein raised the issue of the easement, and caused to be inserted into the deed the language at issue (E153-155).

Linda Buckel, subsequently began improving the property she acquired, and during the period her contractors would use the gravel drive at the upper curb cut (E091- ***9** 093). Ultimately, the work was completed and the property occupied by Buckel.

Disputes arose over the use of the upper curb cut, and Feldstein demanded that the lower curb cut be used. Buckel refused. Feldstein at one point put an unlocked plastic chain across the upper curb cut, and placed "No Trespassing" signs in the area, which were the predicate for this lawsuit. At no time was the curb cut at the rear of the property blocked nor ingress or egress across Feldstein's property at that location impeded (E086).

ARGUMENT

I. STANDARD OF REVIEW

Feldstein in her Motion for Summary Judgment and Memorandum in support asserted, in part, that she was entitled to judgment as a matter of law on both the location and dimension of the easement from the language of the deed itself. On appeal, this Court's review of the trial court's decision is whether the trial court was legally correct. *Leif V. Woltansen v. Richard P. Larsen*, 114 Md. App. 726 (2002); *Bearthy v. Trailmaster Products. Inc.*, 330, Md. 726 (1993).

With respect to the trial court's decision at the time of trial, this Court's review is on both the law and the evidence. MD RULE 8-131(c). A decision or judgment rendered on the evidence should not be set aside unless clearly erroneous. *Urban Site Venture II Ltd. Partnership v. Levering Associates*, 340 Md. 223 (1995). This clearly erroneous standard does not apply to questions of law nor legal conclusions drawn from the factual findings. *ST Sys. Corp. v. Maryland National Bank*, 112 Md. App. 20 (1996). In that ***10** respect, the trial court is either correct or incorrect. *Himmelstein v. Arrow Cab*, 113 Md. App. 156 (1996).

II. THE TRIAL COURT ERRED WHEN IT FOUND THE DEED TO BE AMBIGUOUS

Feldstein filed her Motion for Summary Judgment seeking judgment as a matter of law, *inter alia*, on the issues of the location and dimension of the easement. It was her position that the easement was at the back line of her property and was eight feet wide. Her position was based upon the language of the deed which states: "also the right and privilege to use jointly with the adjoining property owner, as a passageway or outlet, the alley eight feet in width leading to Smallwood Street from the rear of the aforesaid Lot 62...".

The cardinal rules in construing a deed have been established in Maryland from very early times. In *Howard v. Rogers*, 4 H&J 278 (1817), the Court of Appeals found these rules to be as follows:
(a) The intention of the parties is to prevail, if not incompatible with rule or maxim;

(b) the intention is to be determined from the words of the deed as expression of and defining the meaning of the parties;

(c) the deed should be construed most favorably to the grantee; and,

(d) parol evidence is not to be considered nor extraneous circumstances introduced except in the single instance of a latent ambiguity in the deed.

In *Auction & Estate Representatives, Inc. v. Ashton*, 354 Md. 333 (1999), the court found initially that, in Maryland, the objective law of contract interpretation and ***11** construction apply; and, that the grant of an easement is to be strictly construed. The Court went on to state:

> "A court construing an agreement under the test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time the language was established. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume the parties meant what they expressed. In these circumstances, the

> true test of what is meant is not what the parties to the contract intended to mean, but what a reasonable person in the position of the parties would have thought it meant."

354 Md. at 340 (citing *Calomiris v. Woods*, 353 Md. 425 at 436).

See also *Garfmk v. Cloisters at Charles. Inc.*, 392 Md. 374 (2006).

Consequently, the initial determination to be made by the court is whether a latent ambiguity exists in the language of the deed such that it is necessary to consider parol evidence and matters outside the language of the deed to determine the meaning of the language. While, as discussed below, Feldstein does not believe that any ambiguity exists, the trial court does not follow this precept, but rather concludes from extraneous circumstances that the deed is ambiguous. In reaching his conclusion that an ambiguity exists, the trial court stated:

> No. The motion for summary judgment by Defendants is denied on the issue of the easement. Motion for a partial summary judgment by the Plaintiff is denied. In preparation for the hearing, of course, I said with interest and made copious notes to myself for memorandum, umm, and understand that there is language that goes back to the Williams, umm, deed in 1889, which indicates the existence then of a certain passage or way or alley, eight feet in width leading to Smallwood Street from the rear of said lot 22, and that language was carried on in the chain, 1941, same language, 1966, same language, I believe, and umm, and then there is the deed in question which umm, is 2001 matter between the parties. And the failure to include, as I understand it, the failure to include any language in the proposed deed that referred to any existing way or the eight feet ***12** property, you know, along the rear or leading to Smallwood, and that there was some discussion at closing, which led to the insertion of the way into the deed. So certainly there is ambiguity. As to what was intended to be the subject matter of the description of the easement that was placed in the 2001 deed. And I think that there is sufficient ambiguity that would necessitate there to be an evidentiary hearing to determine what was the intent of the parties at that closing, what did they intend to buy, what did they intend to sell. Umm, and it would have to be, I am sure, there would be even with the request for admission, umm, I would suspect there would need to be some evidence as to what, what was the existing way, even as far back as 1983. Now, it is certainly ambiguous and consequently the motion is, both motions have to be denied. (E055-057).

This is clear error on the part of the trial court, which never even addresses the language in the deed in question, but rather refers only to extraneous matters including a "discussion" at closing, which never happened. Moreover, as stated above, and as addressed in Feldstein's Motion, there were two components to the easement, the location and width, and the language with respect to neither is ambiguous.

With respect to location, the deed states: "...leading to Smallwood Street from the rear of Lot 62...". It is submitted that this language is not ambiguous. The word "rear" is the operative word with respect to the location. "Rear" is almost universally defined in the same manner. It is defined as "the back of something" in Random House Dictionary of the English Language, Second Edition, Unabridged, 1987. As an adjective, the word is defined as "being at the back" in Merriam-Webster Online Dictionary. It is defined as being "the part or area farthest from the front" in the Free Dictionary by Farlex, Online. In Merriam-Webster's Collegiate Dictionary, Eleventh Edition, 2003, rear is defined as the back part of something. Finally, in a prepositional phrase, such as here, it is defined ***13** as "in the hindmost part", Oxford English Dictionary, Volume VIII, Clarendon Press, Oxford (1961).

The case of *Rossi v. Douglas*, 203 Md. 190 (1955) demonstrates circumstances when the language in a "contract", there a lease, was deemed to be ambiguous. There the parties entered into a lease, *inter alia*, for "Lot 8 consisting of a store and vacant land in the rear thereof, a plat giving the specific and exact description shall be furnished and made a part of the lease..." There the

word “rear” related to the store and not the lot itself. The issue in the case, however, involved whether all the land to the rear of the store was included or only a part ultimately depicted in the plat signed by the parties. The Court found an ambiguity due to the reference to the plat in the lease itself. The word “rear” itself is unambiguous, and, in contrast to *Rossi*, there is no other provision nor language in the deed that would operate to create an ambiguity.

With respect to the dimension of the easement, there can be no ambiguity as to the meaning of “eight feet”. The deed makes a specific grant of an express easement, and must be strictly construed. *Garfink*. supra. The trial court makes no specific reference to the eight feet, but merely states there is an “ambiguity as to what was intended to be the subject matter of the description of the easement that was placed in the 2001 deed.” As set forth above, his conclusion to this effect was not drawn from the document, but, rather, from his interpretation of extraneous circumstances. In this the trial court was wrong as a matter of law. The easement is eight feet in width.

***14 III. THE TRIAL COURT ERRED IN ITS CONCLUSION ON THE LOCATION OF THE EASEMENT**

Having denied summary judgment to Feldstein on the issues of the location and dimension of the easement, the trial court bifurcated trial dealing first with Counts I and IV, seeking injunctive and declaratory relief, and, concluded that, depending on the outcome of those Counts, trial on Counts II and II would be rescheduled.

The testimony and evidence at the trial on January 20, as to what was intended by Feldstein with respect to the grant of the easement was, to the effect, that the deed prepared pursuant to which she would be conveying the property to Buckel contained no reference to an easement. It was her desire that specific language be included, and that the language which had created the easement originally would be used. It was her desire that the lower curb cut, the one at the rear of the Lot 62, be the alleyway (E153-162). That language was included, and Buckel made no objection to that language nor did she propose any modifications (E085; E153-162). Buckel's claim that the “gravel way” was the easement is predicated upon its being open and visible on the ground, and had been so for some period of time prior to her obtaining title to the Williams Parcel, and that, following her acquisition of her property, her workman regularly used it to access her property. The trial court ultimately determined that the easement was through the upper or north curb cut over the gravel drive to the Buckel property. The rationale of the trial court in reaching this conclusion was the historic use of the property by Feldstein, the apparent lack of use for a long period of the lower curb cut, and the openness and apparentness of the access from Smallwood Street at the upper curb cut (E113-118).

***15** The trial court further concluded that the easement wouldn't be limited to eight feet, but would be enlarged to accommodate today's vehicles, etc. With respect to its conclusion on the location, the trial court was clearly erroneous. With respect to its conclusion on the dimensions, the court was legally incorrect.

Perhaps the most salient fact in the background of this dispute is the fact that it was Feldstein, who upon reviewing the deed, insisted upon the inclusion of language describing the easement Buckel was to have. The trial court simply ignores this fact, and relies on the absence of use of the lower curb cut. In so doing, the trial court renders Feldstein's act and intention a nullity.

As the title history of Lot 62 demonstrates, the alley way was always along the rear property line. When the two parcels comprising Lot 62 came back into common ownership in the **Elders**, the alley way or easement would have merged into the fee simple title. It is axiomatic that one cannot have an easement over one's own property. However, where a property owner utilizes one part of his land to benefit another part, and the land so benefitted is later separated a “quasi easement” may be implied. *Johnson v. Robinson*, 26 Md. App. 568 (1975). The Court of Appeals in *McConihe v. Edmonston*, 157 Md. 1 (1929); quoting *James v. Jenkins*, 34 Md. 1 (1870), stated:

> ***16** “Whenever, therefore, an owner has created and annexed peculiar qualities and incidents to different parts of his estate, (and it matters not whether it be done by himself, or his tenant by his authority,) so that one portion of his land becomes visibly dependent upon another for the supply or escape of water or the supply of light and air or for means of access, or for beneficial use and occupation, and he grants the part to which such incidents are annexed, those incidents thus plainly attached to the part granted, and to which

> another part is made servient, will pass to the grantee, as accessorial to the beneficial use and enjoyment of the land."

157 Md. at 7.

See also *Strasburg v. MDR Development, LLC*, 161 Md. App. 594 (2005).

Had Feldstein done nothing with regard to including language in the deed relating to the easement, and later attempted to assert that either no easement existed or that it was at a particular location other than the gravel drive, the doctrine of quasi easement would have defeated that assertion. For the trial court to conclude that the parties intended the "gravel drive" to be the easement is not only contrary to the testimony of Feldstein, but also contrary to logic because it makes the inclusion of the specific language meaningless. Moreover, Feldstein would have had good reason to want the easement to be located at the rear of the property because it would be farthest from her home and would allow her unrestricted use of the gravel drive for parking, etc. without concern for blocking access to the Buckel property. Buckel does not suffer from the easement being at the rear of the property.

***17 IV. THE TRIAL COURT ERRED IN ITS DETERMINATION OF THE DIMENSION OF THE EASEMENT**

While it is somewhat unclear from the wording of the Amended Judgment, the trial court in its opinion from the bench dealt with the question of the dimension of the easement and stated:
"I mean you, in this day in (sic) age can't say that it is eight feet and only feet. You have to understand, you have to understand that it is for ingress and egress and that means a car going in or a vehicle going in and a vehicle coming out. You can't block it, I mean I'm not going, not going to say that it is eight and a half or seven and a half or whatever, whatever is needed, it is, its use is limited to ingress and egress of an appropriate vehicle to the property." (E119).

As has been set forth above, express easements are strictly construed. The generally accepted rule is that because it is a restriction upon the rights of the serviant property owner no alteration or expansion can be made which would increase the restrictions except by the mutual consent of both parties. See *Garfmk*, supra. While there is case law setting forth the proposition that when a specific easement was established for access for a specific use (such as farming) an easement might be enlarged to accommodate the development of larger farm machinery, etc., that is not the situation which exists here. The language in this deed makes no reference to any particular use, but rather as a "passageway or alley". Where a right of way is of a prescribed width, it does not grow with the size of the trucks or automobiles. "If tautology could clarify the plain words '10 foot alley', It is at least obvious that rights in a 10 foot alley do not include use of automobiles too large for a 10 foot alley. *Burroughs v. Milligan*, 199 Md. 78 at 89 (1951), citing *Feldstein v. Sagall*, 188 Md. 285, 296 (1947). When defined ***18** limits are placed on the grant of an easement, they control. See generally, *Weems v. Calvert County*, 297 Md. 606 (2007).

The dimensions of the easement afforded Buckel is clear. It is eight feet. It was placed in the deed in 2001. Again, the decision of the trial court renders meaningless the express language placed in the deed. Had Buckel, an attorney, wanted clarity or certainty with respect to the access, such could have been discussed or negotiated. It was not. Feldstein wanted the historic easement reestablished and Buckel made no objection. Moreover, it is somewhat incongruous for the court to hold that the language in the deed as to location doesn't mean what it historically did, and at the same time hold that eight feet must be construed with regard to present day. The trial court cannot simply disregard the specific language in the deed.

CONCLUSION

It seems clear in this case that the trial court never got past the location of the "gravel drive" both in reaching its conclusion that the deed was ambiguous and in ultimately determining the location and extent of the easement granted by Feldstein. To

reach its ultimate conclusion, the trial court had to ignore the plain meaning of the language used in the deed. No ambiguity exists as to either the word “rear” or the words “eight feet”.

Even if an ambiguity were to exist, it is difficult to determine how the trial court could construe the intention of Feldstein to be to place the easement close to her home ***19** rather than where it had historically been located. This is especially true given the chain of title which clearly shows where the easement was, and it is the language which is incorporated in to the deed. As the trial court notes, Buckel would have had knowledge of the claim and the language used (E114). As to the dimension of the easement, it seems clear that a determination that it is wider than eight feet would be wrong as a matter of law. The trial court in reaching its findings **neglects** the language in the deed, the chain of title with respect to that language, and the clear intent of Feldstein.

For the reasons set forth herein, Feldstein respectfully prays that the decision of the Circuit Court for Allegany County be reversed.

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